

§ 1040.85

program or activity receiving Federal financial assistance.

(3) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 1040.85 Definitions of “Normal Operation” and “Statutory Objective”.

For purpose of §§1040.86 and 1040.87, the terms *normal operation* and *statutory objective* shall have the following meanings:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 1040.86 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by § 1040.84, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation of a program or activity if:

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 1040.87 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 1040.84 which is based on a factor other than age, even though that action may have

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a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 1040.88 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take such remedial action as the Director, Office of Civil Rights and Diversity, considers necessary to overcome the effects of the discrimination.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient operating a program or activity which serves the elderly or children, in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program or activity.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]

§ 1040.89 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 1040.86 and 1040.87 is on the recipient of Federal financial assistance.

RESPONSIBILITIES OF DOE RECIPIENTS

§ 1040.89–1 General responsibilities.

Each DOE recipient has primary responsibility to ensure that its programs or activities are in compliance with the Act and these regulations. A recipient also has responsibility to maintain records, provide information, and afford access to its records to DOE, to the extent required to determine whether it is in compliance with the Act and these regulations.

[50 FR 8089, Feb. 27, 1985, as amended at 68 FR 51348, Aug. 26, 2003]